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## Sivabalan a/l Bathumalai v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-60–02 OF 2016
ZAWAWI SALLEH, AHMADI ASNAWI AND KAMARDIN HASHIM JJCA
8 FEBRUARY 2017

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*Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant convicted and sentenced to death for offence of trafficking in dangerous drugs — Whether trial court failed to evaluate contradicting statements given by prosecution's witness — Whether trial court made inference unsupported by evidence — Whether trial court failed to consider appellant's defence — Dangerous Drugs Act 1952 s 39B(1)(a) & (2)*

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The appellant was charged with an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) of the same Act. The prosecution's case was that PW1 saw the appellant came out from the passenger side of a Persona car ('the said car') driven by one Hari Narayanan ('PW4') holding an envelope ('P7'). Subsequently, PW1 arrested the appellant and at the crime scene ie Petronas Gas Station Damansara ('the station'), PW1 opened P7 witnessed by the appellant, PW4, PW3 and other member of the police team. Inside P7, PW1 found a plastic packet ('P8') containing crystalline substances suspected to be dangerous drugs. It was later discovered that P7 contained 125.2g methamphetamine ('the impugned drugs'), the subject matter of the present case. In defence, the appellant denied that he was caught with P7 and contended that PW1 framed him up with the impugned drugs. The appellant further contended that he was arrested when he exited from Dunkin Donuts restaurant at the station and not from the said car. At the end of the trial, the trial court found that the defence had failed to raise a reasonable doubt on the prosecution's case. The appellant was thus convicted and sentenced to death. Aggrieved by the decision, the appellant brought the present appeal. The appellant submitted that the trial court had failed to evaluate the contradicting statements given by the prosecution's witnesses and that the learned judicial commissioner ('the JC') had on his own accord made inference unsupported by evidence. The appellant further submitted that the learned JC had failed to consider the defence of the appellant.

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**Held,** allowing the appeal; setting aside the conviction and sentence; and acquitting and discharging the appellant:

(1) The learned JC had on his own accord made inferences unsupported by evidences. The learned JC had failed to consider the material contradictions on two salient issues regarding the fact that the appellant had never exited the said car with P7 and that the impugned drugs were only shown to the appellant, PW3 and PW4 by PW1 at the police station. Had the learned JC examined closely the material contradictions regarding these material issues, it would clearly show that the main prosecution's witness, PW1, was not a credible witness (see paras 24–25).

(2) The testimonies of the prosecution's witnesses were contradictory with each other beside in conflict with the documentary evidence produced in court. The evidence of PW3 and PW4 clearly showed that the appellant was dropped at the station around 3.30pm for him to have his meal at Dunkin Donuts and not at around 5.30pm as testified by PW1. The evidence of PW3, PW4, PW6 and the appellant himself showed that the appellant was arrested when he exited from the Dunkin Donuts and not from the said car. The prosecution's witnesses had adduced two versions of the incident, irreconcilable against each other. In the circumstances, the court would be left with no reliable and trustworthy evidence upon which the conviction of the appellant could be sustained (see paras 25 & 27–28).

(3) The learned JC had dismissed the appellant's defence out rightly without considering the defence in the light of the prosecution's case. The finding of fact of the learned JC was so perversed when taking into consideration the facts that: (a) there were no evidence at all to prove P7 and P8 were found on the appellant; (b) at all times P7 was never with the appellant based on the evidence given by PW3 and PW4 and further corroborated by the appellant himself; (c) PW3 testified that he did not see the appellant holding any envelope but saw PW1 holding it; and (d) lack of DNA evidence or fingerprinting investigation on the exhibits and no CCTV recording produced by the investigating officer, PW6. The failure of the learned JC to adequately consider the defence case was a serious misdirection which warrants appellate intervention. On totality of the evidence, the conviction of the appellant was unsafe (see paras 34–37).

**[Bahasa Malaysia summary**

Perayu dituduh dengan kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama. Kes pihak pendakwaan adalah bahawa PW1 melihat perayu keluar daripada bahagian penumpang kereta Persona ('kereta tersebut') dipandu oleh seorang yang bernama Hari Narayanan ('PW4') dengan memegang sampul surat ('P7'). Kemudiannya, PW1 menangkap perayu dan di tempat jenayah iaitu Stesen Gas Petronas Damansara ('stesen tersebut'), PW1 membuka P7 disaksikan oleh perayu, PW4, PW3 dan anggota polis lain daripada pasukan polis tersebut. Dalam P7, PW1 mendapati paket plastik

('P8') mengandungi bahan kristal disyaki dadah berbahaya. Ia kemudiannya diperolehi bahawa P7 mengandungi 125.2g methamphetamine ('dadah yang dipersoalkan tersebut'), perkara kes ini. Dalam pembelaan, perayu menafikan bahawa dia ditangkap dengan P7 dan berhujah bahawa PW1 menganiayanya dengan dadah yang dipersoalkan tersebut. Perayu selanjutnya berhujah bahawa dia ditangkap apabila dia keluar daripada restoran Dunkin Donuts di stesen tersebut dan bukan daripada kereta tersebut. Pada akhir perbicaraan, mahkamah perbicaraan mendapati bahawa pembelaan telah gagal untuk membangkitkan keraguan munasabah ke atas kes pendakwaan. Perayu oleh itu disabitkan dan dijatuhkan hukuman mati. Tidak berpuas hati dengan keputusan tersebut, perayu membawa rayuan ini. Perayu berhujah bahawa mahkamah perbicaraan telah gagal untuk menilai pernyataan bertentangan yang diberikan oleh saksi-saksi pendakwaan dan bahawa pesuruhjaya kehakiman yang bijaksana ('PK') telah dengan sendiri membuat keputusan yang tidak disokong oleh keterangan. Perayu selanjutnya berhujah bahawa PK yang bijaksana gagal untuk mempertimbangkan pembelaan perayu.

**Diputuskan,** membenarkan rayuan; mengetepikan sabitan dan hukuman; dan membebaskan dan melepaskan perayu:

(1) PK yang bijaksana telah dengan sendirinya membuat keputusan tidak disokong oleh keterangan. PK yang bijaksana telah gagal untuk mempertimbangkan material bercanggah atas dua isu penting berkenaan fakta bahawa perayu tidak pernah keluar daripada kereta tersebut dengan P7 dan bahawa dadah yang dipersoalkan tersebut hanya ditunjukkan kepada perayu, PW3 dan PW4 oleh PW1 di stesyen polis. Sekiranya PK bijaksana memeriksa secara terperinci material yang bercanggah berkenaan isu-isu material ini, ia akan jelas menunjukkan bahawa saksi utama pendakwaan, PW1, bukan saksi yang boleh dipercayai (lihat perenggan 24–25).

(2) Keterangan saksi-saksi pendakwaan adalah bertentangan sesama sendiri selain bertentangan denagn keterangan dokumentar yang dikemukakan di mahkamah. Keterangan PW3 dan PW4 jelas menunjukkan bahawa perayu dihantar di stesyen pada kira-kira pukul 3.30 petang untuk dia makan di Dunkin Donuts dan bukan pada pukul 5.30 petang seperti yang diberi keterangan oleh PW1. Keterangan PW3, PW4, PW6 dan perayu sendiri menunjukkan bahawa perayu ditangkap apabila dia keluar daripada Dunkin Donuts dan bukan daripada kereta tersebut. Saksi-saksi pendakwaan telah mengemukakan dua versi kejadian, tidak dapat disamakan satu sama lain. Dalam keadaan, mahkamah tidak mempunyai keterangan yang boleh dipercayai atas mana sabitan perayu boleh dipertahankan (lihat perenggan 25 & 27–28).

(3) PK yang bijaksana telah menolak pembelaan perayu secara terus tanpa mempertimbangkan pembelaan berdasarkan kes pendakwaan. Dapatan

fakta PK yang bijaksana tersangat membantah apabila mempertimbangkan fakta bahawa: (a) tidak terdapat keterangan langsung untuk membuktikan P7 dan P8 didapati pada perayu; (b) pada kesemua masa P7 tidak pernah berada dengan perayu berdasarkan keterangan yang diberikan oleh PW3 dan PW4 dan selanjutnya disokong oleh perayu sendiri; (c) PW3 memberi keterangan yang dia tidak nampak perayu memegang sampul surat tetapi melihat PW1 memegangnya; dan (d) ketiadaan keterangan DNA atau siasatan cap jari ke atas ekshibit-ekshibit dan tiada rakaman CCTV dikemukakan oleh pegawai penyiasat, PW6. Kegagalan PK yang bijaksana untuk mempertimbangkan secara wajar kes pembelaan adalah serius salah arah yang mewajarkan campur tangan mahkamah rayuan. Atas keseluruhan keterangan, sabitan perayu adalah tidak selamat (lihat perenggan 34–37).]

**Notes**

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

**Cases referred to**

*Goh Ming Han v PP* [2015] 3 MLJ 781, CA (refd)
*Noor Azman bin Abidin v PP* [2013] MLJU 703; [2014] 1 CLJ 58, CA (refd)

**Legislation referred to**

Dangerous Drugs Act 1952 ss 37(da)(xvi), 39B(1)(a), (2), First Schedule

**Appeal from:** Criminal Trial No 45A-27–02 of 2013 (High Court, Shah Alam)

*Geethan Ram Vincent (Geethan Ram) for the appellant.*
*Aslinda bt Ahad (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Kamardin Hashim JCA (delivering judgment of the court):**

**[1]** The appellant was convicted and sentenced to death by the High Court at Shah Alam for an offence of trafficking in dangerous drug under the Dangerous Drugs Act 1952 ('the Act'). The charge reads as follows:

> Bahawa kamu pada 6.7.2012 jam lebih kurang 5.30 petang di tempat letak kereta Stesen Minyak Petronas PSS Mutiara, Lot PT 40036, Jalan PJU 7/2, Damansara, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan telah memperedarkan dadah berbahaya Methamphetamine sejumlah berat 125.2 gram. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

**[2]** Aggrieved, the appellant appeals to this court against his conviction and sentence. We heard the appeal on 10 January 2017 and we had unanimously allowed the appellant's appeal. We now give the detailed reasons for our decision.

## THE PROSECUTION'S CASE

**[3]** Briefly, the prosecution's case as can be gleaned from the learned judicial commissioner's ('learned JC') finding of fact are as follows. On 6 July 2012, at about 3.30pm, Insp Saravanan a/l Diwanantong ('PW1') received an information from his informer about drug trafficking activity involving some male Indians who would be using a Proton Persona car WUR 4415 at Stesyen Minyak Petronas PSS Mutiara, Lot PT 40036, Jalan PJU 7/2, Damansara, Selangor ('the Petronas station').

**[4]** Based on the information received, PW1 gave a short briefing to his raiding team. Soon after, PW1 and his team of 16 officers left the Narcotics Office, IPK Selangor in five groups in five respective vehicles.

**[5]** At about 5.10pm, 6 July 2012, PW1 and his team were already at the Petronas station. Together in PW1's team was Det Sgt Major Abd Khalid and Cpl Kamaruddin. They took position at the Petronas station parking area right in front of the entrance door to 'Kedai Mesra' and did surveillance in that area. The rest of the team were spread out all over the Petronas station at different strategic locations.

**[6]** After about 20 minutes, PW1 was informed by Det Sub Insp Sukdarshan via walkie talkie that the Proton Persona car WUR 4415 was spotted going into the Petronas station area. Thereafter, PW1 saw the said car stopped at the parking area on the right side of the Petronas station which was about 15–20 meters from PW1's car where he and his team was waiting.

**[7]** PW1 saw the driver of the said Proton Persona car WUR 4415, later identified as Hari Narayanan a/l Manoharan ('PW4'), alighting from the said car and walked towards the 'Kedai Mesra'. PW1 also saw another male, Indian later identified as the appellant, came out from the back passenger side of the car holding an envelope ('P7') and started walking towards the Petronas station. PW1 immediately instructed his raiding team to arrest the two suspects.

**[8]** The appellant was apprehended and arrested by PW1 together with two other members of his raiding team after PW1 identified himself as a senior police officer. The appellant tried to run away but PW1 and his officers

managed to subdue and arrest the appellant. The driver of the car was arrested by members of the raiding team inside the 'Kedai Mesra'.

**[9]** After the two suspects had been arrested, PW1 brought them back to the said Proton Persona car and PW1 discovered there was another male Indian seated in the front passenger seat of the car, which was later identified as Krishna a/l Selvam ('PW3'). PW1 then opened the envelope ('P7') witnessed by the appellant, PW4, PW3 and other members of the police team. Inside P7, PW1 found a plastic packet ('P8') containing crystalline substances suspected to be dangerous drugs ('P9').

**[10]** The crystalline substances in P8 was subsequently sent by the investigating officer, Insp Muhamad Izhar bin Md Sani ('PW6'), to the chemist, Suhana bt Ismail ('PW5'), for analysis. Upon analysis, PW5 confirmed the exhs P9 to be dangerous drugs type methamphetamine weighing 125.2g, listed in the First Schedule of the Act.

FINDINGS OF THE LEARNED JC AT THE END OF THE PROSECUTION'S CASE

**[11]** At the close of the prosecution's case, the learned JC found that the appellant had physical possession of the impugned drugs based on the fact that the appellant was seen by PW1 holding the envelope ('P7') which contained the impugned drugs. On the issue of knowledge, the learned JC held that the conduct of the appellant who had attempted to run away when PW1 identified himself as a senior police officer gave rise to an inference that he had knowledge of the drugs he was carrying in the envelope ('P7').

**[12]** Having found that the prosecution had proved the element of possession, the learned JC invoked the presumption of trafficking under s 37(da)(xvi) of the Act for the element of trafficking. The learned JC held that the prosecution had proven a prima facie case against the appellant on the proffered charge. Thus, the appellant was ordered to enter his defence on the said charge.

THE DEFENCE

**[13]** The appellant elected to give evidence under oath. The appellant testified that on 6 July 2012 at 2.30pm, he received a call from PW4 who invited him to follow PW4 to Damansara Mutiara. Thereafter, PW4 drove the appellant from Klang to Damansara Mutiara in the said Proton Persona car. Upon arrival at the said Petronas station at about 3.30pm, the appellant alighted from the car and went to the Dunkin Donuts restaurant which was next to the Petronas station for his food. After that, PW4 drove the Proton

Persona car away from the said Petronas station. Before leaving, PW4 told the appellant that he will come back at around 4.30pm.

**[14]** At about 4.30pm, the appellant who was then in the Dunkin Donuts restaurant observed that the Proton Persona car driven by PW4 had arrived at the Petronas station and parked there. The appellant said that he saw PW4 getting out from the said car and went into the 'Kedai Mesra' inside the Petronas station.

**[15]** The appellant testified that he quickly finished his meal in the restaurant and proceeded to walk towards the said car. After walking for about 35 ft towards the said car, the appellant said that he was arrested by the police. The appellant said that he was handcuffed midway between the Dunkin Donuts restaurant and the Proton Persona car. The appellant told the trial judge that he had tried to run away because he thought that those people had wanted to rob him.

**[16]** The appellant further testified that after been handcuffed, he was brought to the Proton Persona car where he saw PW3 sitting inside the car. Thereafter, he was brought to the Petaling Jaya Police Station. At the police station he, PW3 and PW4 were instructed by PW1 to sign the search list, P4. PW1 brought the envelope ('P7') and showed it to him and asked him whether the said envelope belong to him. He replied that he did not know and he only saw it there. PW1 then opened the envelope and showed its contents to him.

**[17]** The appellant said that the envelope ('P7') and its contents did not belong to him and that he did not bring any envelope from Klang to Damansara Mutiara and he did not see any envelope in the Proton Persona Car.

FINDINGS AT THE END OF THE DEFENCE BY THE LEARNED JC

**[18]** Having evaluated the evidence of the appellant, the learned JC found that the crux of the appellant's defence was that he was framed by PW1. The learned JC did not believe the appellant's defence as no police report had been made by the appellant and no evidence on record to establish animosity between PW1 and the appellant. Learned JC further found that there was no reason for PW1 to frame up the appellant.

**[19]** The learned JC further found that the rest of the appellant's defence consisted of bare denials and that the appellant had failed to raise a reasonable doubt on the prosecution's case and to rebut the presumption of trafficking under s 37(da)(xvi) of the Act, on the balance of probabilities. The appellant was thus convicted and sentenced to death.

A THE APPEAL

**[20]** Before us, learned counsel canvassed the following two issues:

(a) failure of the learned JC to adequately consider that the prosecution had led two conflicting version in its case; and

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(b) failure of the learned JC to adequately consider the appellant's defence.

**[21]** On the first issue, learned counsel argued that the learned JC had failed to evaluate the contradicting statements given by the prosecution witnesses and that the learned JC had on his own accord made inferences unsupported by evidence. Learned counsel highlighted that there are material contradictions regarding the following issues:

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(a) the fact that the appellant never exited the said Proton Persona car with the envelope P7; and

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(b) the place and time that the impugned drugs were shown to SP3, SP4 and the appellant.

E **[22]** On the second issue, learned counsel argued that the learned JC had failed to consider the defence of the appellant based on two issues, namely:

(a) the fact that P7 and P8 was never found on the appellant; and

(b) the failure to investigate by the investigating officer ('PW6').

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**[23]** Learned counsel complaints that the learned JC had dismissed the appellant's defence out rightly without considering the defence in the light of the prosecution's case.

G OUR DECISION

**[24]** We found merits in the complaint of learned counsel in respect of the first ground of appeal that the learned JC had on his own accord made inferences unsupported by evidences. This is shown in his grounds at pp 24–25 of the AR Vol 1 as follows:

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> 32. Although it is a fact that the accused was not in the Proton Persona Car when it was driven by PW4 to the parking lot of the Petronas station with PW3 inside, it does not mean that there was contradiction between the evidence of PW1 who said he saw the accused coming out from the back passenger car door and that of PW3 and PW4 who testified that the accused was not in the car. This is because the accused was already at the Petronas station at 3.30pm and it is possible that he was near to the vicinity of the parked car and hence seen by PW1 as coming out from the

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car from a distance away. It is not disputed that the accused was at the Petronas station at the material time and was arrested by the police in that area at point * in P12 which was closed to the parked car.

**[25]** In making the finding as above, we found the learned JC had failed to consider the material contradictions on two salient issues regarding the fact that the appellant had never exited the said Proton Persona car with an envelope P7 and that the impugned drugs were only shown to the appellant, SP3 and SP4 by PW1 at the police station. Had the learned JC examined closely the material contradictions regarding this material issues, it will clearly show that the main prosecution's witness, PW1, is not a credible witness. We also found that the testimony of the prosecution's witnesses were contradictory with each other beside in conflict with the documentary evidence produced in court. We would say that the testimony of the prosecution's witnesses, especially PW4 cannot be relied on to sustain a conviction against the appellant.

**[26]** From the record, we found that SP1's evidence is materially contradicted by the evidence of SP3, SP4 and SP6's on the following issue (at p 4 AR Vol 27:

... Dan penumpang belakang kereta tersebut iaitu seorang lelaki India keluar daripada kereta tersebut sambil memegang sampul surat dan menuju ke stesyen minyak.

**[27]** The aforesaid evidence of PW1 is seriously in contradiction with the testimony of PW3, PW4 and PW6, the investigating officer. The evidence of PW3 and PW4 clearly showed that the appellant was dropped at the Petronas station around 3.30pm for him to have his meal at Dunkin Donuts and not at around 5.30pm as testified by PW1. After dropping the appellant, PW4 went to fetch PW3 at the Maybank and both PW3 and PW4 came back to the Petronas station at around 5.30pm. When they came back, the appellant was not with them. The appellant was at all the material time having his meal at Dunkin Donuts restaurant at the said Petronas station. The appellant, therefore, did not exit from the Proton Persona car as alleged by PW1 holding the envelope P7. The evidence of PW3, PW4, PW6 and the appellant himself showed that the appellant was arrested when he exited from the Dunkin Donuts restaurant and not from the said Proton Persona car.

**[28]** We agreed with learned counsel's submission that the prosecution witnesses have adduced two versions of the incident, irreconcilable against each other. In this situation, the court would be left with no reliable and trustworthy evidence upon which the conviction of the appellant can be sustained. This principle has been succinctly discussed by Abdul Rahman Sebli JCA in *Goh Ming Han v Public Prosecutor* [2015] 3 MLJ 781 at pp 787–788, as

follows:

> [12] With due respect to the learned judicial commissioner, he was not at liberty to accept both versions to be credible when the two versions were irreconcilable and in total conflict with one another. Either he believed SP2 and SP3 or he believed SP8 or he disbelieved all three of them. The learned judicial commissioner went into further error when he said that the evidence of SP2 and SP3 corroborated the evidence of SP8.
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> [13] The contradiction gives rise to the question; what did the prosecution prove at the close of its case in relation to custody or control of the container that contained the drugs? Was the container lying on the floor and picked up by the police or was it picked up by the appellant and handed to SP8? This fact was never established one way or the other as the learned judicial commissioner did not make a finding either way.
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> [14] The contradiction is serious and cuts deep into the prosecution case as it involves the crucial question of whether the drugs were in the appellants' custody or control at the time of the raid. It is trite law that where there is a doubt on any essential element of the charge the doubt must be resolved in favour of the accused especially where as in this case the doubt arose from the prosecution's own evidence.
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> [15] The learned judicial commissioner however dismissed the contradiction as a minor discrepancy and concluded that the drugs were brought into the room by the appellant who placed it next to the mattress near the door. It was of course for the learned judicial commissioner to make such finding of fact but before doing so he had a duty to evaluate the entire evidence and the probabilities of the case.
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> [16] The rule that the prosecution's evidence must be subjected to a maximum evaluation at the close of its case requires that the trial court directs its mind properly and adequately to every material aspect of the evidence both for and against the prosecution in order to determine whether the strict requirement of proof has been met by the prosecution.
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> [17] In finding that it was the appellant who put the container near the mattress inside the room, it is clear the learned judicial commissioner relied heavily on the evidence of SP2, SP3, SP4 and SP6 who denied having anything to do with the drugs. The evidence of SP2 was particularly damaging to the appellant as her testimony was that it was the appellant who brought the white plastic bag into the room where the drugs were found.
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> [18] With due respect to the learned judicial commissioner although the credibility and the trustworthiness of any witness is a matter that is entirely for him to decide, he ought in circumstances to have taken their evidence with some reservation or even with a pinch of salt as they were all suspects in the case and in fact arrested together with the appellant in the same house. SP8 himself admitted in cross-examination that the reason why he arrested everyone in the house was because he did not know who owned the drugs, and this was despite having told the court the it was the appellant who handed the drugs to him.

**[29]** The learned JC had on few instances made wrong findings of fact without the support of any evidence or clearly contrary with clear evidence. At

p 23 AR Vol 1, the learned JC held that:

> 30. The evidence of PW1 that he saw the accused coming out from the back passenger side of the Proton Persona car is corroborated by the evidence of PW3 who testified that while he was in the car at the parking lot of Petronas station, he heard someone opened the left back car door and shut it. Hence, from a distance of 15 meters from the Proton Persona car to where PW1 was observing, what PW1 told this court that the accused was coming out from the car is true.

**[30]** Whereas from the evidence of PW3, the facts were materially contradicted. At pp 17–18 AR Vol 2, PW3 evidence established these:

> Jam 5.30 petang hingga 5.45 petang kami tiba di Petronas. Petronas adalah stesyen minyak. Saya duduk di depan sebelah driver dalam kereta Hari. Semasa dari Maybank ke stesyen minyak Petronas, Damansara Mutiara, tiada sesiapa yang lain dalam kereta tersebut kecuali saya dan Hari. Sampai di stesyen Petronas Hari parking kereta dan turun. Dia *parking* di kawasan Petronas dalam *parking*. Saya tidak nampak mana Hari pergi. Dia cuma beritahu saya dia hendak beli air. Semasa Hari beli air dari kedai Petronas, saya duduk dalam kereta, dengar ada orang buka pintu belakang kereta saya. Saya dengar pintu kereta sebelah kiri di buka. Saya tidak lihat siapa yang buka pintu itu. Saya dengar bunyi buka pintu dan tutup lagi. Selepas tutup pintu dalam beberapa *seconds*, ada beberapa orang kepung kereta yang saya naiki itu. Mereka kepung di sebelah kiri, kanan dan depan kereta. Mula-mula saya tidak tahu siapa yang mengepung. Selepas itu saya pusing sebelah kiri, nampak seorang lelaki India di tahan oleh beberapa oran.

**[31]** Further, learned JC had wrongly held that PW1's evidence that the appellant was holding the envelope P7 was corroborated by the evidence of PW3. At p 24 AR Vol 1, learned JC held:

> 31. Furthermore, PW3 confirmed that one of the two Indian men who were detained by the police was holding an envelope, thus proving the truth of PW1's evidence that he arrested the accused with the envelope P7 containing the impugned drugs.

Whereas, PW3 in his evidence did not say so. PW3 in his evidence only stated that the envelope P7 was in the hand of PW1 when he first saw it. At p 19 AR Vol 2, PW3 told the court:

> masa saya pusing, saya nampak seorang India ditahan oleh beberapa orang dan seorang lagi lelaki India memegang sampul surat.

**[32]** We observed that later the learned JC had contradicted himself in his finding as can see from pp 24–26 AR Vol 2 as follows:

> 32. Although it is a fact that the accused was not in the Proton Persona car when it was driven by PW4 to the parking lot of the Petronas station with PW3 inside, it does not mean that there was contradiction between the evidence of PW1 who said he saw the accused coming out from the back passenger car door and that PW3 and PW4 who testified that the accused was not in the car. This is because the accused

was already at the Petronas station at 3.30pm and it is possible that he was near to the vicinity of the parked car and hence seen by PW1 as coming out from the car from a distance away. It is not disputed that the accused was at the Petronas station at the material time and was arrested by the police in that area at point * in P12 which was close to the parked car.

33. Next, the evidence given by PW3 who said that he did not see the envelope in the car and PW4 who said that he did not see the accused bring anything while the accused was in PW4's car from the Klang to Damansara is irrelevant and does not damage the evidential strength of the prosecution's case as what the prosecution seeks to prove here was the accused was in possession of P7 when he was arrested. This case is not about P7 being found by the police in the Proton Persona car. In fact from the time the accused went to the Petronas station at 3.30pm until about 5.30pm, PW4 had no knowledge as to what the accused had in his possession during this period.

34. On the issue of timing of the arrival of the Proton Persona at the Petronas station, PW1's evidence was that it was about 5.30pm when he saw the said car stopped at the parking lot of the Petronas station. The time about 5.30pm was corroborated by the evidence of PW3 who testified that he arrived in the Proton Persona at the Petronas station at about 5.30pm–5.45pm.

35. As for PW4, he said that he drove the Proton Persona to the Petronas station at 4.30pm. PW4's time of 4.30pm is however contradicted by his own evidence that he was at the counter of the Petronas station shop buying drinking water at 5.30pm.

36. Having considered the evidence of PW1, PW3 and PW4 with the backdrop that time of an event that has happened is based on the nearest estimation, it is may finding here that the time involved here was about 5.30pm or its thereabout when the Proton Persona made its entrance into the Petronas station and not at 4.30pm. PW1 and PW3 are more credible witnesses than PW4 on the issue of time. PW4 being a friend of the accused, his evidence should be treated with caution.

**[33]** Despite the material contradictions and the shortcomings as highlighted above, the learned JC found that all the prosecution's material witnesses including PW1 to be credible and truthful witnesses. At p 27 AR Vol 1, learned JC stated at para 38 as follows:

38. Having considered the evidence of PW1 carefully, I am convinced that PW1 was a credible witness and that he had given uncontradicted and clear evidence in court as to the arrest of the accused together with the impugned drugs. Far from contradicting PW1's evidence, the evidence of PW3 corroborated PW1's evidence as stated by my findings above. The evidence given by PW4 also did not contradict the evidence of PW1 on any material aspects.

**[34]** We now turn to ground two of the appeal. Learned counsel argued that the learned JC did not adequately consider the appellant's defence. We agreed with learned counsel's complaint that the learned JC had dismissed the appellant's defence out rightly without considering the defence in the light of the prosecution's case. This is revealed in the learned JC grounds at pp 32–34

AR Vol 1:

49. On the evidence given by the accused, as I see it, the accused denied that he was caught with the envelope P7 which contained the impugned drugs and that PW1 framed him up with the impugned drugs.

50. With regards the accused's defence of a frame up by PW1, the accused agreed under cross-examination that he did not know PW1 before this incident and there was no animosity between them. The accused also did not make a police report until today against PW1 about the frame up. The accused feeble excuse when cross-examined on this point is this:

> Ini adalah kes pertama, saya tidak berapa tahu tentang membuat laporan polis terhadap Insp Saravanan. Kalau saya dapat peluang, saya akan membuat laporan polis.

51. It is my considered finding of fact, that if the defence of a frame up is true, the accused could have easily made a police report against PW1 himself or through his family members whom I am sure would have visited him during his remand in the police lockup and prison.

52. Moreover, there was no obvious reason for PW1 to frame up the accused with the impugned drugs since PW1 had not known the accused before and there was no whatsoever evil motive involve on the part of PW1. PW1 was just a regular police officer doing his job of enforcing the law and there was nothing for him to gain by framing up the accused. PW1's evidence as I see it is not inherently incredible. Hence, I do not believe the accused's defence of a frame up against him by the police. Such a defence without any basis is a fictitious defence created by the accused. I therefore do not accept the accused's defence of a frame up. I am further convinced that the rest of the accused's defence consisted of *bare denials*. *Bare denials* of the accused where he was not caught with the impugned drugs, and that he did not know about the said drugs.

53. In the event, having considered the accused defence of a frame up as unacceptable and as a bare denial, it is my considered finding that the accused has not raised a reasonable doubt on the prosecution's case.

54. Furthermore, the defence failed to rebut on a balance of probabilities the presumption of trafficking under s 37(da)(xvi) of the DDA which was invoked in the prosecution's case. The amount of methamphetamine involve here is consistent to trafficking in the drugs.

55. As such, I concluded that the prosecution has proven its case against the accused beyond any reasonable doubt.

56. According, I found the accused guilty and convict him as charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s 39B(2) of the same Act. I therefore sentenced the accused to death by hanging.

**[35]** We found that the finding of fact of the learned JC was so perversed when taking into consideration the facts below:

(a) that there were no evidence at all to prove that the envelope ('P7') and the plastic packet containing the drugs ('P8') were found on the appellant;

(b) at all times the envelope ('P7') was never with the appellant based on the evidence given by PW3 and PW4 and further collaborated by the appellant himself;

(c) SP3 evidence who observed as to how the appellant was arrested testified that he did not see the appellant holding any envelope ('P7'), but saw PW1 holding it; and

(d) lack of DNA evidence or fingerprinting investigation on the exhibits and no CCTV recording obtain and produce by the investigating officer ('PW6').

**[36]** It is our judgment that the failure of the learned JC to adequately consider the defence case is a serious misdirection which warrants appellate intervention. On this issue, suffice for us to refer to a judgment by Hamid Sultan Abu Backer JCA in *Noor Azman bin Abidin v Public Prosecutor* [2013] MLJU 703; [2014] 1 CLJ 58 as follows:

> [12] The hallmark of judgment writing in criminal case is achieved only when there has been a just and fair assessment of the defence story as long as it is not inherently incredible taking into consideration that it is for the prosecution to prove its case beyond reasonable doubt at the prosecution case as well as the defence stage, notwithstanding the fact where the law may require the defence to rebut the charge on balance of probabilities. Lack of proper assessment will in actual fact compromise the integrity of the decision making process, making the conviction unsafe. The related jurisprudence on assessment of the defence case was eloquently stated by Sharma J as early as 1971 in the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 in the following words:
>
> > A conviction cannot be sustained even if the court is satisfied that the prosecution story 'may be true' unless and until it is found that the prosecution story 'must be true'. The burden of proof remains on the prosecution throughout the trial. If the learned magistrate was not satisfied with the case of the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case. The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt.

## CONCLUSION

**[37]** On the various reasons stated above, and based on the totality of the evidence, it was our judgment that the conviction of the appellant was unsafe. We, therefore, unanimously allowed the appeal. We set aside the conviction and sentence of the High Court and we substituted it with an order that the appellant be acquitted and discharged. So ordered.

*Appeal allowed; conviction and sentence set aside; appellant acquitted and discharged.*

Reported by Dzulqarnain Ab Fatar